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Judgment: approved by the Court for handing down | *Delivered:* **16/07/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF A SOLICITOR

IN THE MATTER OF THE SOLICITORS ORDER (NORTHERN IRELAND) 1976

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MORGAN LCJ

[1] This is an appeal pursuant to Article 41A (6) of the Solicitors (Northern Ireland) Order 1976 (the 1976 Order) of a decision of the Clients Complaints Committee of the Law Society on 8 May 2012 when it determined that the professional services provided by the appellant firm were not of the quality that could reasonably be expected and that the professional costs to which the appellant firm should be entitled in respect of the services provided to Mrs McComb (the client) should be nil. Mr Shaw QC and Mr Gowdy appeared for the appellant and Mr McGleenan QC for the Law Society. I am grateful to all counsel for their helpful oral and written submissions.

Background

[2] The client and her husband attended with a solicitor in the appellant firm on 29 January 2007. She indicated that she had sustained an accident when working at Marks & Spencer's premises at Abbey Centre on 17 November 2006. A box of fruit juice cartons had fallen and caused injury to her left foot as a result of which she was seen at the Mater Hospital and then at the Royal Victoria Hospital Belfast. As a result of this consultation a letter of claim was written to Marks & Spencer on 21 February 2007. A reply was received denying liability on 23 May 2007 and a statement from another employee was enclosed in support of the denial.

[3] The client was asked to attend with the appellant firm and eventually did so on 29 August 2007 in the company of her husband. She was advised that on the information available the case had a 50/50 chance of success. The client and her

husband agreed to get corroborative evidence from Ms Bell, a witness. The client was advised that subject to the corroborating evidence the next step would be a legal aid application followed by court proceedings.

[4] In October 2007 Ms Bell contacted the solicitors. At the same time the client's husband raised the possibility that the incident was covered by CCTV. The latter enquiry was followed up by the solicitor acting in the case but in February 2008 the proposed defendant indicated that no CCTV footage was available. There appears to have been some difference of view between the corroborating witness and the client's husband about the content of her statement but on 17 January 2008 the witness attended the solicitor to finalise and sign her statement.

[5] On 10 February 2008 the client and her husband again attended with the solicitor to discuss various aspects of the case including the processing of a legal aid application and the completion of Form CLA4 dealing with the client's financial circumstances. In the absence of the completed form the solicitor followed this up on 7 May 2008 advising the client to return the form and on 12 May 2008 forwarded a draft statement for the legal aid application. The solicitor received an e-mail on 18 May 2008 requesting a further Form CLA4 which was sent out to the client on 19 May 2008.

[6] On 4 June 2008 the client wrote to the solicitor enclosing the Form CLA4. She expressed concern about the length of time the case was taking but accepted that some of the delay was her responsibility. She questioned why legal aid was necessary and asked whether it was because the solicitor had doubts about her case being winnable. The solicitor asked the client to attend for a further consultation in June and August 2008 to complete her legal aid statement and eventually on 15 December 2008 the client and her husband attended to review the client's letter of 4 June 2008. The solicitor explained that no litigation was risk-free and that legal aid should be applied for. He also explained that the client would have to take proceedings in court in order to progress the claim. At that meeting she signed her legal aid application and was given a further Form CLA4. She was advised about the statutory charge and told that her legal aid application would be submitted once she updated the Form CLA4.

[7] On 24 February 2009 the solicitor wrote to the client following up on the matters discussed on 15 December 2008. He advised that her claim should be prosecuted in a timely manner as it became statute barred on 16 November 2009. He also advised that it might become necessary for her to fund the relevant court fee to allow the issue of proceedings to keep the claim alive in light of possible delay in dealing with the legal aid application. The next response was from the client's husband on 2 March 2009 seeking a copy of the witness's statement which was sent the following day. On 26 March 2009 the solicitor had a further consultation with the client and her husband as a result of which it transpired that neither of them had the Form CLA4. The solicitor advised them that time was running against the client and

that she should complete immediately all the forms required for legal aid. On 3 April 2009 the Form CLA4 was returned but sections in relation to housing costs and savings were not completed. On 5 April 2009 the client's husband wrote seeking yet another new Form CLA4 which was sent on the following day. The form was never completed.

[8] A protective writ of summons was issued on 17 November 2009 in order to prevent the claim becoming statute barred. On 9 March 2010 there was an attendance with the client's husband in relation to medical notes and records. Further information on this was provided by the client and her husband on 13 March 2010 and forms of authority in respect of medical records were returned as a result of which these were obtained and the client and her husband advised that an orthopaedic surgeon would be required to comment on her injuries. The client agreed to attend an appointment with the surgeon on 17 June 2010. The surgeon recommended a report from a radiologist and advice was received from counsel who recommended the retention of a consulting engineer. In light of the increasing costs the solicitor then dealing with the matter wrote to the client on 23 August 2010 to discuss progress.

[9] On 24 August 2010 the client wrote noting the advice to obtain the services of a consulting engineer. She questioned whether this was necessary. She noted the considerable costs associated with such services. She indicated that she wished to consult her husband's brother-in-law whom she described as a Senior High Court Judge sitting at the Old Bailey. These issues were comprehensively addressed in an e-mail dated 6 September 2010 from the solicitor. In particular the solicitor explained that a writ of summons had been issued on 17 November 2009 but not yet been served. In order to keep the action alive that ought to be done by 31 October 2010 and the client's agreement to that course was sought. In addition it was indicated that the solicitor agreed with the advice of counsel that the case should then be remitted to the County Court once the writ of summons was served. The solicitor expressly indicated that in litigation of this sort the losing party pays both sets of costs and indicated that it was a much cheaper option to run this case in the County Court. The solicitor noted that the client had not returned the necessary forms to complete her legal aid application.

[10] A further meeting was arranged with the solicitors for 23 September 2010. The client agreed that the writ of summons should be served by 14 November 2010 so as to keep the claim alive. She wished to pursue a legal aid application and it was agreed that this would be processed as soon as the forms were returned. The writ was duly served and on 5 and 20 October 2010 the client was asked to return the Form CLA4. On 11 February 2011 the solicitors confirmed that the insurers were agreeable to the case being remitted but indicated that they did not wish to do so until they had received the legal aid forms. The client e-mailed asking precisely what forms were missing. By letter of 15 February 2011 the solicitor explained that the only outstanding form was the Form CLA4. He sent a further copy by post and a

blank copy by e-mail as well. Some further e-mails were exchanged as a result of which the appellant received an e-mail with a hand written endorsement suggesting that their interest in the appellant's brother-in-law had amounted to harassment and that the client no longer had any respect for the solicitor. In those circumstances the solicitor indicated that they could no longer act since the necessary confidence between solicitor and client was no longer present. On the same day the appellant sent a fee advice note claiming £2973.25 plus VAT for professional services and £1092 plus VAT for outlay including medical expenses, counsel's fee and court fees. These fees were, of course, subject to taxation.

The complaint

[11] The client complaint form was dated 8 April 2011 but appears to have been marked received by the Law Society on 16 May 2011. The terms of the complaint were as follows: –

> "Solicitor first instructed January 2007. Negligence and cavalier attitude to my case. Told me my costs will be covered by legal aid. But they never applied for it. Then sent me a bill for 4659."

The assertion of negligence and the cavalier attitude needs to be seen in the context that the client had sent a letter to the solicitors dated 24 August 2010 in which she had expressly said that she was not taking any issue with the quality of the service delivered by the solicitor. That issue is not, however, one with which these proceedings are concerned. The second immediate observation on the terms of the complaint is that there was no evidence adduced at any stage of these proceedings that the solicitor advised the client that costs would be covered by legal aid. Indeed the proceedings have been conducted on the basis that no such assertion was made.

[12] The Law Society referred the complaint to the firm on 13 June 2011 and a response was forwarded on 29 July 2011. The Society wrote again on 7 November 2011 asking for evidence of correspondence to the client which detailed the financial consequences for her if the firm continued to work on the file in the absence of legal aid. The Clients Complaints Committee also noted that the client's written authority was not provided for either the additional professional fees or the outlay. In a further response dated 13 March 2012 the appellant took issue with whether written authority or notification was necessary. It maintained that the client was aware of and approved the expenditure on her behalf.

[13] At its meeting on 8 May, 2012 the Client Complaints Committee, which acts on behalf of the Council of the Law Society on this issue, resolved as follows: –

> "that an inadequate professional service had been delivered to Mrs McComb under the provisions of

> Article 41A (1) (a) of the Solicitors (NI) Order 1976 as amended, in that the solicitors had failed to properly secure the client's authority to run up professional fees and incur outlays in circumstances where the court client may have qualified for legal aid and that the professional fee… should be limited to nil as a consequence…."

The relevant statutory provisions

[14] Part III of the 1976 Order is entitled Professional Practice, Conduct and Discipline. The heading for Article 41A which falls within that Part is "Imposition by Council of Disciplinary Sanctions for Inadequate Professional Services". The relevant provisions on which the Clients Complaints Committee acted are: –

> "41A. - (1) Where it appears to the Council that the professional services provided by a solicitor in connection with any matter in which he or his firm had been instructed by a client were in any respect not of the quality that could reasonably have been expected of him as a solicitor, then… the Council may, if they think fit, do one or more of the following things, namely-
>
> (a) determine that the costs to which the solicitor shall be entitled in respect of those services shall be limited to such amount as may be specified in their determination and direct the solicitor to comply, or to secure compliance, with such one or more requirements falling within paragraph (2) as appear to them to be necessary in order to give effect to their determination;"

The right of appeal is contained within Article 41A (6) of the 1976 Order which provides that the powers on appeal are that the determination or direction of the Council may be affirmed or revoked or any other determination or direction which could have been made or given may be made.

[15] Both parties agreed that the appeal should be by way of rehearing and indeed both called evidence from solicitors as to prevailing practice. I also accept that this should be an appeal by way of rehearing but it is important to identify the scope of the appeal. As the heading to Article 41A of the 1976 Order makes clear this is part of the disciplinary regime concerned with the quality of service to be expected from solicitors. It is important, therefore, that there is no ambiguity in the finding which

the solicitor seeks to challenge. Article 41A makes clear that the power of the Council, exercised by the Clients Complaints Committee, arises in connection with any professional work which was "in any respect not of the quality that could reasonably have been expected of him as a solicitor". There is, therefore, an obligation to identify with precision the respect in which the quality of the work was not of the requisite standard. The scope of the appeal is determined by that finding. It is not open to the parties to enlarge the issues on appeal.

[16] The parties also agreed that the issues arising in this case were unlikely to give rise to any form of precedent. The Solicitors (Client Communication) Practice Regulations 2008 came into effect on 1 September 2008. These provide for the provision of costs information in Regulation 4 and there is a Schedule containing a Code of Practice setting out the written information to be given to the client in relation to costs. It is agreed that since the relationship of solicitor and client in this case arose on 29 January 2007 the Regulations do not apply. There were no such obligations set out in any Regulations prior to the 2008 Regulations.

The expert evidence

[17] Mr Andress was called by the plaintiff as an expert. He sits on the Contentious Business Committee of the Law Society and has been a member of the Clients Complaints Committee. He said that where a solicitor was instructed to pursue a case the normal rule was that the client was responsible for the costs and outlays incurred unless there was some other method of funding. In this case the client had been advised on numerous occasions about the obtaining of legal aid but had not taken the steps necessary to have her application considered.

[18] He considered that initially the solicitor was instructed to pursue the case by way of negotiation with the insurer and after that to get a witness statement for the purpose of pursuing the case to court. The client had been expressly informed in December 2008 that she may become responsible for the fees connected with the issue of the writ. She gave her permission to obtain the medical notes and records and was notified of the attendance with the orthopaedic surgeon in order to progress her claim. In those circumstances he considered that there was at least implied authority to incur the costs related to the medical examinations and the obtaining of the records. Counsel's opinion would in any event have been necessary in order to obtain legal aid and would not have been recoverable. He considered that the client had been advised persistently about legal aid but had failed to do anything about it. The costs incurred were those that might have been expected in the circumstances.

[19] In cross-examination he agreed that there was a duty upon the solicitor to raise the issue of legal aid with the client who appeared to be within scope but it was accepted by all parties that the appellant had satisfied its duty in that regard. The client was anxious for the case to proceed and in those circumstances it was necessary to issue a protective writ, to obtain the medical records and to obtain a

medical report. If it were necessary to obtain express authority in relation to every outlay cases would never get finished. These outlays and the work done were not unusual. It was clear from the correspondence of 24 August 2010 that the client was aware of the issues about costs but was still anxious to proceed.

[20] In support of his contentions Mr Andress drew attention to a document entitled "Terms of Engagement and Terms of Business" which had been issued by the firm in which Ms Smyth worked. He drew attention to the section indicating that the solicitor would issue court proceedings on behalf of the client and brief counsel where the solicitor felt it appropriate. Mr Andress also drew attention to the section indicating that any disbursements incurred by the solicitors on behalf of the client during the course of undertaking the work would be charged. There was no indication that the express oral or written authority of the client was required for any of these matters.

[21] Ms Smyth was a qualified solicitor of 15 years' experience and her competence and abilities were not in question. There was, however, an issue about her independence as an expert. Between 1998 and 2010 she had worked for Mr Daly who was a partner in the firm of Francis Hanna and Company and the instructing solicitor in the defence of this appeal on behalf of the Law Society. It appeared that her affidavit had been prepared in draft by Mr Daly although she made some modifications to it before signing it. He had drawn to her attention the cases of Fennel v Johns Elliott [2007] NIQB 72 and Tiffin Holding Ltd v Millican 49 DLR 216 upon which she had placed reliance at paragraph 10 of her affidavit.

[22] She indicated that it would be unreasonable for a solicitor to spend more than £50 without authorisation. She agreed that the client had given her written consent to obtain the medical records but said that the client may not consider who would pay. She said that the terms of reference to which Mr Andress referred were drafted by the principal and she accepted that there was a measure of discretion as to how to go about a client's business. She accepted that the note of 23 September 2010 indicated that the client was aware that costs were her responsibility. She agreed that it was possible for solicitors who were reasonably competent to take differing views on these matters.

[23] The Court of Appeal has recently considered in Young v Hamilton and others [2014] NICA 48 the assistance which can be derived from this sort of debate between competent solicitors. In the event the comments in that case apply with equal force in this appeal.

Consideration

[24] The starting point is to determine the scope of the appeal. The resolution of the Clients Complaints Committee is somewhat ambiguous. In substance the resolution states that in circumstances where the client may have qualified for legal

aid, the solicitors had failed to properly secure the client's authority to run up professional fees and incur outlays. That immediately raises the question of whether there is a distinction between this appeal and the steps that need to be taken to secure a client's authority for fees and outlays when the client would not qualify for legal aid. There is nothing in the resolution itself nor, so far as I can see, anything in the discussion recorded within the minute of the relevant meeting to suggest that there should be such a distinction. It is also noteworthy that the fact that the client might have qualified for legal aid was not a factor in the observations of the two solicitors who were called to give evidence on the circumstances in which a client's authority should be obtained.

[25] This was a case in which the solicitor had assiduously pressed the client to pursue an application for legal aid. The letter of 4 June 2008 indicated that the client was doubtful about whether she should do so. Having regard to all the circumstances it appears to me that this was a case in which the client might have qualified for legal aid but chose not to take the necessary steps to pursue that application. The question is whether in those circumstances the solicitor had failed to properly secure her authority to run up the professional fees and incur the outlays.

[26] One of the issues which was debated in this appeal was the extent to which I should give weight to the views of the Clients Complaints Committee. I have recently touched on this issue in Re a Solicitor [2014] NIQB 46 and consider that I should take the same view in this case. I consider, however, that the consideration of the Clients Complaints Committee in this case appears to have focused on the client's general entitlement to legal aid rather than on the client's determination that her claim should proceed despite the fact that she had not availed of that entitlement. The evidence before me indicates that in the latter circumstance the client is in the same position as a client who is not eligible for legal aid.

[27] I recognise that in light of the 2008 Regulations a client care letter would have been required if the instructions had been received after 1 September 2008. That was why in this case it was helpful to me to have evidence about the general practice of solicitors in such proceedings prior to that date. Ms Smyth accepted that the issues in this case were matters upon which reasonable solicitors might have differing views. Her own principal's written terms of engagement did not correspond with her views as to what constituted reasonable practice but appeared to me to be more in line with the views of Mr Andress. Ms Smyth accepted that Mr Andress was a solicitor of considerable experience and background in these matters. The Society sought some support from the decision in Macdougall v Boote Edgar Esterkin (2001) 1 Costs LR 118. That was a case in which the issue concerned the entitlement of a partner to a specific fee. The fact that there was no express authority for that fee did not prevent the partnership recovering costs on the basis of taxation. I do not consider that this case is of any assistance in this instance.

Conclusion

[28] In light of the evidence of Mr Andress I do not accept that the services provided by the appellant were not of a quality that could reasonably have been expected of the appellant as a solicitor and accordingly I revoke the determination.